



ATTORNEY GENERAL OF TEXAS  
G R E G   A B B O T T

February 5, 2004

Ms. Caroline Kelley  
Assistant City Attorney  
City of Missouri City  
1522 Texas Parkway  
Missouri City, Texas 77489

OR2004-0874

Dear Ms. Kelley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195630.

The City of Missouri City (the "city") received two requests from the same requestor for information concerning a job position. The first request asks for copies of the survey results and the status of a position for which the requestor applied. The second request asks for copies of the application, personnel action form, date of hire, salary and assessment results for the successful candidate for the buyer's position. You state that the city provided the requestor with a copy of the successful applicant's personnel status change form. The personnel status change form contains the applicant's name, position, hire date, salary, and pay plan classification. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.110, 552.117, 552.130 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the city received the requestor's first written request for information on October 25, 2003.<sup>1</sup> You state that the city received a second request for information on November 10, 2003. You concede that the city did not seek an open records decision from our office within the ten business day period mandated by section 552.301 of the Government Code with regard to the first request.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The city did not, however, submit these required items to this office for the first request until November 20, 2003.

Because you did not comply with the requirements in section 552.301 with respect to the first request, the information responsive to the first request is presumed to be public information.<sup>2</sup> Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information affects third party interests. *See* Open Records Decision No. 150 (1977). You contend that the information responsive to the first request affects third party interests and may be excepted from disclosure under section 552.110. Therefore, we will consider whether section 552.110 applies to the submitted information.

The submitted information includes three reports administered and copyrighted by Profiles International, Inc. ("Profiles"). Two reports are responsive to the first request and one report is responsive to the second request. Although the city takes no position with respect to the release of these reports, you state and provide documentation showing that the city notified

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<sup>1</sup>We note that October 25, 2003 is a Saturday. Therefore, we assume that the first request was actually received on Monday, October 27, 2003.

<sup>2</sup>We note that the city met the requirements of section 552.301 with respect to the second request for information.

Profiles, whose propriety interests may be implicated by the release of this information, of the request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Profiles has not submitted any comments to this office explaining how release of the reports would implicate its proprietary interests. Therefore, Profiles has provided us with no basis to conclude that it has a protected proprietary interest in the reports. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990), 542 at 3 (1990). Therefore, none of these reports may be withheld under section 552.110 of the Government Code.

However, you have noted that some of the materials at issue are copyrighted. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Next, we address your section 552.102 claim against disclosure. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial*

*Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. You contend that the employee's salary history from previous employment should be protected by common law privacy. This office has found that the age, salary, title and dates of employment of public employees are not excepted from required public disclosure under common law privacy. *See Open Records Decision Nos. 444 (1986), 342 (1982)*. There is a legitimate public interest in the salary history of a public employee. Therefore, the employee's salary history is not excepted from disclosure under sections 552.101 and 552.102 and must be released.

You claim that section 552.117 of the Government Code is applicable to some of the submitted information responsive to the November 10 request. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You explain that in this case the employee requested confidentiality under section 552.024 prior to the city's receipt of the request for information. Therefore, the city must withhold information we have marked under section 552.117 of the Government Code.

Further, you contend that a portion of the requested information is excepted from disclosure under section 552.130 of the Government Code. This section provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the Texas driver's license number and type we have marked under section 552.130 of the Government Code.

The submitted information also contains an e-mail address obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the employee has affirmatively consented to the release of his personal e-mail address from the submitted materials. Accordingly, the city must withhold the employee's personal e-mail address under section 552.137 of the Government Code.

In summary, the reports may not be withheld under section 552.110 and must be released in accordance with applicable copyright laws. The marked information must be withheld under section 552.117. The Texas driver's license number and type we have marked must be

withheld under section 552.130. The marked e-mail address must be withheld under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Vela-Martinez", with a stylized, cursive script.

Melissa Vela-Martinez  
Assistant Attorney General  
Open Records Division

MVM/sdk

Ref: ID# 195630

Enc. Submitted documents

c: Mr. Reed Stoddard  
P.O. Box 2228  
Round Rock, Texas 78680-2228  
(w/o enclosures)